actually foresaw the possibility of the event or new circumstances in question does not necessarily prevent the doctrine of frustration from applying.
Cases since 1956 have endorsed and applied the test for frustration formulated in the *Davis Contractors* case."

We are of the view that the doctrine of frustration does not apply in this case.

In the result this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *P.C. Tock & Co.; L.A.J. Smith*

INTERSCHIFF SCHIFFAHRTSAGENTUR GmbH v. SOUTHERN STAR SHIPPING & TRADING PTE. LTD.

[O.C.J. (Lai Kew Chai J.) August 24, 1982]
[Singapore – Suit No. 3183 of 1978]

Shipping Law – Charterparty – Charterers' agents/plaintiffs as stakeholders – Bills of Lading to be released on deposit of US$100,000 to stakeholders – Defendants' irrevocable undertaking to plaintiffs to remit by TT US$100,000 amounted to contract – Alternatively, equitable assignment – Inference from telex messages.

Contract – Telex messages – Irrevocable undertaking by telex – Inference from telex messages – Equitable assignment.

Fraud – Fraudulent misrepresentation, allegation of – High degree of proof required.

The plaintiffs were ship-brokers and agents for the Charterers, Sea Transport Services Co. Under the terms of a time charterparty entered in mid-March 1978 between the Charterers and the Owners of the vessel, m.v. "Smirnachos Frangistar" the Charterers were required to deposit a sum of US$100,000/- with the plaintiffs, as stakeholders, to ensure due performance and observance of the Charterers' obligations. The deposit was to be made before the owners/master would release Bills of lading at Pusan, South Korea.

The vessel arrived at Pusan on March 24, 1978 and started loading on arrival when she was in the service of the Charterers. Loading was completed by March 31, 1978 and the shippers were awaiting the release of bills of lading to be signed by the owners' agents. The plaintiffs had not by this date received the deposit from the Charterers. At the Charterers' request, the plaintiffs agreed to extend credit of US$100,000/- to the Charterers on 2 conditions.

1. that the defendant company, the Singapore agents of the Charterers responsible for the encashment of freight from shippers would telex to the plaintiffs confirmation of their receipt of irrevocable instructions from the Charterers to teleremit US$100,000/- to the plaintiffs upon receipt of the freight.

2. the Charterers, themselves, would telex the plaintiffs that they have irrevocably instructed the defendants to remit the said sum to the plaintiffs out of freight received by them and earned by the Charterers as a result of the operations of the vessel.

The telex sent on Easter Friday 1978 by the Charterers to the defendants read as follows, "... Now Mr. Richter of Intershiff with whom I had long talk confirmed to me that he is agreeable to tell owners Frangistas OK we have received today the 100.00 dol. so no prob. provided you can send a telex to them telling that: vou are acting as our general agents in Far East that you are responsible for cashment of freight and that you have received irrevocable instructions from us that upon receipt freight you will TT immi 100.00 dollars to Interschiff and remit the balance to us ..."

The defendants' telex to the plaintiffs was as follows, "... we have received irrevocable instructions from sea transport antwerp that upon receipt frets of s frangistas will imdtly tt repeat tt usdllrs 100,000 to intershiff of hamburg and the balance frts will be remit under further instruction frm sea transport."

The Defendants failed to honour the commitment to the plaintiffs, and instead, remitted to the Charterers direct the sum of US$228,000/- on April 13, 1978 and a further sum of US$85,049.25 on April 24, 1978.

The Charterers became insolvent and failed to pay the plaintiffs. The plaintiffs honoured their commitment to the owners and paid them US$100,000/- on August 14, 1978. The plaintiffs commenced the action against the Defendants to recover the said sum.

Held; (1) there was a contract between the plaintiffs and the Defendants as evidenced by the defendants' telex to the plaintiffs dated March 31, 1978. The consideration therefor was the defendants' request to the plaintiffs to cause the release of the bills of lading;

(2) in the alternative, even if there was no contract between the plaintiffs and the defendants, the two telexes both dated March 31, 1978, one from the Charterers to the defendants and the other from the defendants to the plaintiffs, constituted a good equitable assignment of the debt due from the Defendants to the Charterers.

(3) a high degree of proof is required to make good any allegation of fraud and misrepresentation. The plaintiffs' confirmation to the owners that they were holding US$100,000/- at the owners' disposal was not a fraudulent misrepresentation.

Case referred to:

(1) *William Brandt's Sons & Co.* v. *The Dunlop Rubber Co* [1905] A.C. 454; [1904-7] All E.R Rep. 345, 21 T.L.R. 710.

CIVIL SUIT.

G. Pannirselvam (*Peter Loh* with him) for the plaintiffs.

H.E. Cashin (*Jeffrey Beh* with him) for the defendants.

Lai Kew Chai J. (delivering oral judgment): The Plaintiffs are claiming the sum of US$100,000/- and interest thereon against the Defendants under a contract allegedly made on March 31, 1978 as evidenced in a telex sent by the Defendants to the Plaintiffs. Alternatively, the Plaintiffs claim the same sum as assignee under an equitable assignment of a debt due from the Defendants to the Charterers which the Defendants knew was made over.

In the Amended Defence, the Defendants deny there was a concluded contract. They assert that there was no equitable assignment of any sort. They finally allege that in the circumstances set out in para 5(a) of the Amended Defence the Plaintiffs were a party in a fraudulent conspiracy between the Plaintiffs and the Charterers under which the Shipowners were defrauded. In these circumstances, they say the Plaintiffs are not entitled to seek the aid of this Court.

Before I set out the facts of this case, I need to say something about the parties. The Plaintiffs are a company carrying on the business of ship brokering in Germany. They were brokers for the Charterers known as Sea Transport Services Co. The owners of m.v. "Smirnachos Fragnistas" ("the Vessel"), a Panamanian registered vessel, were Azulino S A of Panama for whom Messrs Byonness & Rynning were acting as brokers.

The Defendants are a Singapore incorporated company and at all material times they acted as agents for the Charterers in the encashment of freight earned by the Charterers arising out of the service of the Vessel in this part of the world.

The Plaintiffs as charterers' agents had been dealing with the owners of the Vessel since 1971. In mid March 1978, the Charterers chartered the Vessel from the owners under a Time-Charter Party. Clause 63 of the Charterparty stated as follows:–

"63. Before release of bladings at first loadport Charterers to deposit with "INTERSCHIFF" or arrange for bank guarantee for min US Dollars 100,000.00 as guarantee for Charterers obligations under this C/P except for hire purposes wording of guarantee to be agreed upon."

I find that this clause was later superseded by 3 paragraphs which appear in Agreed Bundle page 9 which are set out as follows:–

"charterers, for the good performance of the charter party will deposit to messrs. interschiff in hamburg, and prior owners/master releasing bills of lading at pusan, the amount of usdlrs. 100,000.- to cover their obligations, under this charter party, other than charter the payments.

this amount will be released to charterers, after completion of the voyage, as soon as they have performed fully their obligations, in accordance with terms and condition of my "smirnachos fragnistas" charter party dated ...

in case charterers fail to perform any of their contractual obligations, then owners to be fully entitled to draw any amount out of this usdlrs.100,000.- as may/becoming due cover charterers contractual obligations, deriving out of this charter."

The effect of the 3 paragraphs, it seems to me, was that the Charterers had to deposit a sum of US$100,000/- with the Plaintiffs who were to act as stakeholders.

In the event, the Vessel arrived at Pusan on March 24, 1978. She started loading on arrival when she was in the service of the Charterers. The Bills of Lading obviously had to be issued to shippers and before they were issued they had to be signed by the owners' agents on the authority of the owners of the Vessel.

By Easter Friday in 1978, on March 31, 1978, the Plaintiffs had not received the sum of US$100,000/- from the Charterers. Mr. Horst Schonrogge gave evidence for the plaintiffs. He said that Mr. Richter, his Managing Director, knew Mr. Emile Dechaine. Emile Dechaine was the Manager of the Charterers. He sought the assistance of the Plaintiffs. He said in evidence that Mr. Richter had on Easter Friday agreed to give credit of US$100,000/- to the Charterers on 2 conditions.

The first condition was that the Defendants who were the Singapore agents responsible for the encashment of freight from shippers had to telex confirm their receipt of irrevocable instructions to teleremit US$100,000/- to the Plaintiffs upon receipt of the freight.

Secondly, the Charterers themselves had to telex the Plaintiffs that they had irrevocably instructed the Defendants to remit US$100,000/- to the Plaintiffs out of the freight received by them and earned by the Charterers as a result of the operations of the Vessel.

Mr. Schonrogge said that these conditions were regarded by his company as security, in consideration of which the Plaintiffs would agree to send a telex to the owners in terms which would comply with the 3 paragraphs I have recited earlier.

The other aspect of the commercial background of this case which I should set out is the knowledge of the Defendants on Easter Friday, 1978. Mr. Thomas Tay, the Managing Director of the Defendant company, gave evidence on behalf of the Defendants. He admitted that he was aware of the problems regarding the release of the Bills of Lading to the shippers. It should be noted, and he knew, that only upon the release or in exchange for Bills of Lading to be issued in Pusan, South Korea, that the Defendants could receive the freight earnings. He also candidly admitted in his evidence that he knew that the Plaintiffs would take steps on receipt of his telex to cause the Bills of Lading to be issued. He wanted the Plaintiffs to do so. He also admitted that that was the very intention of his despatch of the telex. He was aware that the purpose of sending the telex to the Plaintiffs was to give the Plaintiffs the go-ahead to resolve the Bills of Lading problem.

Having set out the commercial background, I now turn to the two crucial documents in the resolution of the issues in this case.

I refer to the first document which was a telex sent on Easter Friday 1978 by the Charterers to the Defendants. As this is a contractual document I set it out in full:–

"Frangistas as you might know this vsl has been fixed to us on TCC via our agents in Hamburg (as brokers) Messrs Intershiff. Guarantee of 100,000 dol is to be remitted to them order solve the baldings problems. Now Mr Richter of Intershiff with whom I had long talk confirmed to me that he is agreeable to tell owners Frangistas OK we have received today the 100.000 dol so no prob. provided you can send a telex to them telling that: you are acting as our general agents in Far East that you are responsible for cashment of freight and that you have received irrevocable instructions from us that upon receipt freight you will TT immi 100.000 dollars to Intershiff and remit the balance to us (or whatever we tell u to do)"

The other contractual document is the Defendants' telex to the Plaintiffs. I quote it full:–

"pls be informed that we are acting as general agent for sea transport antwerp in far east and we are responsible for cashment of freights on all vsls fixed in far east.

we hv recvd irrevocable instructions frm sea transport antwerp that upon receipt frets of s frangistas will imdtly tt repeat tt usdllrs 100,000 to intershiff of hamburg and the balance frts will be remit under further instruction frm sea transport.

our full style
southern star shipping n trading pte ltd
suite 1501 shenton house
no 3 shenton way
singapore 1
tel 2203707 (5 lines) 2203213/2203214
direct line 2203702
cabadd southsea singapore
Ix rs23400 a/b seastar
person in charge: mr thomas tay/mr henry quai"

As allegation of a conspiracy to defraud has been raised, it is also convenient at this stage to set out the telex which the Plaintiffs had sent to the owner's agents all within a short time on Easter Friday, 1978. The telex was as follows:-

"we are very pleased to reconfirm that we are holding at owners disposal the agreed amount of usdlrs 100.000.- disposable in compliance with the terms of the charterparty clause 63 and in compliance with the wording of the guarantee as negotiated.

pls reconfirm owners have given instructions now for the bladings to be signed and released to charterers agents."

For the Plaintiffs it was contended that the telex sent by the Defendants to the Plaintiffs on March 31, 1978 was a contract and that it was a commitment on the part of the Defendants to immediately remit by teletransfer the sum of US$100,000/- to the Plaintiffs upon receipt of the freight. As far as consideration is concerned, counsel for the Plaintiffs urges me to infer that the Defendants had impliedly requested the Plaintiffs to take steps to resolve the problem as regards the release of the Bills of Lading, a matter of obvious urgency as the Vessel had by then completed unloading at Pusan and shippers were awaiting for the release of the Bills of Lading.

I am satisfied in my mind that Mr. Thomas Tay, a shipping agent of some experience, knew that he was making a commitment to the Plaintiffs and that he knew that as a result of his telex the Plaintiffs were going to take steps to cause the release of the Bills of Lading. The telex he had received from his principals, the Charterers, clearly disclosed to him the commercial background. I find that the Defendants by the telex had requested the Plaintiffs to cause the release of the Bills of Lading. That was the consideration. In fact in his telex to the Plaintiffs he even set out the full style of his organisation, clearly intending to assure the Plaintiffs that they would honour their commitment.

After receiving the telexes from both the Defendants and the Charterers, the Plaintiffs sent a telex on the same day to the owners to the effect that they were holding at owners' disposal the

agreed amount of US$100,000/- in compliance with the terms of the charterparty clause 63 and in compliance with the wording of the guarantee as negotiated. The words "in compliance with the wording of the guarantee as negotiated" obviously refer to the 3 paragraphs appearing on page 9 of the Agreed Bundle. By that document, the Plaintiffs had made a commitment to the owners that they were holding the said sum at owners' disposal. They were relying on the credit arrangement made with the Charterers who through Mr. Emile Dechaine had promised to remit the US$100,000/- by April 7, 1978. Although Mr. Schonrogge said that the loan was not entered in the account books of the Plaintiff company, I accept his evidence that the arrangement was in fact made between the Plaintiffs and the Charterers who at that time were financially sound.

But as far as the Defendants are concerned, they seemed to have forgotten or they ignored their commitment as evidenced by their telex of March 31, 1978 to the Plaintiffs. Instead of honouring their commitment and remitting US$100,000/- to the Plaintiffs, the Defendants on April 13, 1978 remitted the sum of US$228,000 directly to the Charterers. This remittance was made some 13 days after the Defendants had made the committment. I do not accept Thomas Tay's evidence when he said that he thought he was merely relaying a message. The words of his telex read in the commercial context at the time and having regard to his knowledge which I have found must surely mean that he knew that he had given an irrevocable undertaking to the Plaintiffs to remit by TT the said sum of US$100,000.

Now, he said in evidence that he had not received a telex dated April 10, 1978 which the Plaintiffs said that they had sent to the Defendants to ask for the remittance. The original of this telex is marked "AB25A". I am satisfied that the telex was in truth and in fact sent to the Defendants. Whether Thomas Tay saw the telex or not is not important and I make no finding on this point. Four days after this telex the Defendants sent another sum of US$85,049.25 again to the Charterers. Thomas Tay said that he had heard nothing from the Plaintiffs. I do not accept this as a good excuse. He had made a commitment. The ball was in his court. It was for him to fulfil his commitment and send the US$100,000 by TT as he had undertaken in his telex of March 31, 1978.

I am not unaware that the Plaintiffs had not disclosed the telex of April 20, 1978 at the stage when they sought to obtain summary judgment. This was purely an oversight and I accept Mr Horst Schonrogge's explanation in this regard as well. It was overlooked.

In the event the Charterers collapsed financially. They could not pay the Plaintiffs. There were various negotiations and attempts by the Plaintiffs to recover the sum of US$100,000 from the Charterers directly without exercising their recourse against the Defendants. But in view of the insolvency of the Charterers they took these proceedings against the Defendants to enforce their rights.

Having given their commitment to the owners by their telex of March 31, 1978 which appears in AB15, the Plaintiffs honoured their obligations to the owners and paid them the sum of US$100,000 on April 14, 1978: see AB48.

If I am wrong in coming to the conclusion that there was a concluded contract between the Defendants and the Plaintiffs as evidenced by the telex from the Charterers to the Defendants and the Defendants' telex to the Plaintiffs on March 31, 1978, I would turn to the alternative claim of the Plaintiffs that there had been an equitable assignment. The principle is set out by Lord Macnagthen in the House of Lords in *William Brandt's Sons & Co.* v. *The Dunlop Rubber Co.*[1]

I quote what he said there:-

> "But, says the Lord Chief Justice, 'the document does not, on the face of it, purport to be an assignment nor use the language of an assignment.' (obviously referring to the facts in another case). An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor disregards such a notice he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor. I think that the documents which passed between Brandts and the company would of themselves, and apart from Kramrisch and Co's undertaking and engagement given to Brandts, have constituted a good equitable assignment."

Having stated the principle I would briefly summarise the facts in *Brandt's* case. Kramrisch & Co were customers of Brandt's who were bankers. Kramrisch were importers of raw rubber

which they eventually on-sold to Brandt's & Co. Kramrisch were financed by Brandt's in the import of the raw rubber. Brandt's, in making out the delivery orders for the release of the rubber, had set up a system which was recorded in the correspondence between them and Kramrisch. In the correspondence Dunlop Co. was involved. The documentation was done in the following terms and I quote:-

"'Kramrisch and Co., Liverpool, 6th January, 1903.
"Messrs. The Dunlop Rubber Company, Ltd.
"Dear Sirs, – We should thank you to kindly sign the attached letter and forward same to Messrs Wm. Brandt's Sons and Co., London, E.C.

"Yours very truly,
KRAMRISCH AND CO."

"Para Mills, Birmingham, 8th January, 1903.
"Messrs. Wm. Brandt's Sons and Co., 4 Fenchurch Avenue, London, E.C.

"Dear Sirs, – Herewith we beg to confirm that we shall remit, subject to approval of goods, the amount of invoice –

Pds369 1s. 10d. for 8) Packages
Pds3, 263 4s. 2d. for 75) raw rubber

received to-day from Messrs. Kramrisch and Co., Liverpool, when due, direct to your good selves for account of Messrs. Kramrisch and Co.

"Yours faithfully."

Brandt's sent on this form entire enclosed in the following letter:-

"Dated, London, January 7, 1903.

"Dear Sirs, – Enclosed we beg to hand you a letter received from Messrs. Kramrisch and Co., Liverpool, referring to
8 packages Indiarubber, amounting to Pds369 2s. 10d.
75 packages Indiarubber, amounting to Pds 3,263 16s. 4d.,
which Messrs. Kramrisch and Co. advise having forwarded to you.
"We request you to kindly return to us the counterpart duly signed by your goodselves.
"And remain, dear Sirs, yours truly,
"WM. BRANDT'S SONS AND CO.
"The Dunlop Rubber Company (Limited), Para Mills, Birmingham."

The important consideration in *Brandt's case* is the necessity that a debtor should be given to understand that a debt has been made over by the creditor to some third person.

I am satisfied that Thomas Tay knew that whatever freight he was receiving on account of the Charterers had been made over to the Plaintiffs up to the sum of US$100,000. There can be no doubt about that and looking at the two telexes between Charterers and the Defendants on the one hand and the Defendants' telex to the Plaintiffs on the other, I have also come to the conclusion that if there were no contract between the parties to these proceedings, those two documents constituted a good equitable assignment. The Defendants were clearly under a duty to pay the Plaintiffs. They paid the Charterers instead. They did so at their own peril.

I should finally turn to the Defendants' allegation that there was a conspiracy to defraud the owners. I accept Mr. Schonrogge's evidence that he was very careful in his telex to the owners. One should consider his wording very carefully. All he was saying was that he was holding at owners' disposal the agreed amount of US$100,000. So far as the owners were concerned, they were relying on the confirmation of the Plaintiffs. How the US$100,000 was to be paid to the Plaintiffs by the Charterers is of little importance. I think in view of the long business dealings between the Plaintiffs and the shipowners since 1971, it was probable and I find that the owners only wanted the Plaintiffs' confirmation that the latter were holding the sum at their disposal. The Plaintiffs did not say that they had received cash. That cannot be read into nor can it be inferred from the telex of March 31, 1978. There was no intention to deceive the owners. The Charterers were facing a critical situation on Easter Friday 1978 when Bill of Lading had to be issued. They asked the Plaintiffs to help. The Plaintiffs agreed to help and they gave the undertaking to the shipowners relying on the arrangements with the Charterers and the Defendants. They relied on the security arrangements which I have described. I want to say that in view of the high degree of proof required to make good any allegation of fraud as stated by *Phipson* on Evidence in para 123, the owner of the vessel would not, on the facts disclosed in this case, be able to prove any conspiracy to defraud or any fraudulent misrepresentation against the Plaintiffs. I therefore find myself unable to accept the defence of illegality.

Accordingly I give judgment for the Plaintiffs in the sum of US$100,000.00 with interest thereon at 12% per annum from the date the Plaintiffs had paid the owners, i.e. August 14, 1978 and costs.

Claim allowed.

Solicitors: *Drew & Napier; Y.M. Jumabhoy & Co.*